

3(18) ✓
408(e)

January 26, 1976

Dear _____ :

This is in further response to Mr. _____ ' letter of November 10, 1975 to _____ and your phone conversation of December 23, 1975 with _____ and _____ of my staff.

According to Mr. _____ ' letter of November 10, 1975, exemption pursuant to section 408(a) of the Employee Retirement Income Security Act of 1974 (ERISA) to permit a proposed profit sharing plan to purchase qualifying employer securities from existing shareholders, primarily the Chairman of the Board of Applicant, at "book value" subject to adjustments as provided in article IX of the Applicant's By-Laws. You indicate that the proposed plan would function similar to an "ESOP" in that an individual participant's accounts would be credited directly with shares of qualifying employer securities.

_____ letter requests a ruling that section 408(e) of ERISA is applicable to the proposed purchase of employer securities. Section 408(e) of ERISA provides, in part, that sections 406 and 407 shall not apply to securities (as defined in section 407(d)(5)): 1) if such acquisition or sale is for adequate consideration, 2) if no commission is charged with respect to the acquisition or sale, and 3) if the plan is an eligible individual account plan (as defined in section 407(d)(3)).

Under section 3(18) of ERISA the term "adequate consideration," in the case of a security for which there is no generally recognized market, means the fair market value of the security as determined in good faith by the trustee or named fiduciary with respect to a plan pursuant to the terms of the plan and in accordance with regulations promulgated by the Department of Labor. The Department has not yet issued such regulations and does not, at the present time, contemplate making advance determinations as to adequate consideration in the case of individual purchases and sales. Such guidelines as will be issued will be general guidelines in the form of regulations under section 3(18) of ERISA.

In view of the fact that no regulations have been issued under section 3(18), the trustee of the plan would have to make a good faith determination with respect to the fair market value of the applicant's common stock, utilizing recognized methods of determining the value of stock in closely held corporations.

To the extent the position expressed in this letter is inconsistent with our letter dated January 15, 1975, the views set forth herein are controlling.

I regret any inconvenience which may have resulted from our correspondence. If I can be of any assistance, please do not hesitate to contact me.

Sincerely,